

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 61561-1-I
)	
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
KARL EMERSON PIERCE,)	
AKA KARL EMERSON-DURANT)	
PIERCE,)	
)	
Appellant.)	FILED: June 8, 2009
)	

Appelwick, J. — Pierce was convicted by a jury of one count of possession of a stolen vehicle and one count of possession of stolen property in the second degree. He appeals, contending that the procedure used for drawing the jury venire in his case violated his rights under the federal and state constitutions. Pierce also claims that he should be granted a new trial, because he was deprived of his constitutional right to a conflict-free attorney. Finding no constitutional or other basis for reversing Pierce's convictions, we affirm.

FACTS

On the afternoon of July 27, 2007, Seattle Police Officer Barnes was on routine patrol when he observed a white Mitsubishi Montero being driven by Karl

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Pierce. Because Pierce was acting suspiciously, the officer checked the vehicle's license plates against the list of vehicles that had been reported stolen within the city of Seattle, Washington. After determining that the car was not on that list, the police officer and his partner, Officer Mitchell, continued patrolling the area.

After a few minutes, the two police officers saw the same white Mitsubishi Montero parked near an apartment complex. They saw Pierce walking away from the driver's side of the car and entering one of the apartment units. Meanwhile, Officer Mitchell used the computer in the patrol car to do another check of the vehicle's license plate. He learned that the Mitsubishi Montero had been reported stolen in Mountlake Terrace, Washington. Pierce was then arrested. After being told that he was being arrested for auto theft, Pierce asked, "[w]hat car?" When Officer Mitchell pointed in the direction of the Mitsubishi Montero, Pierce said he had never been inside that car.

The vehicle was impounded and towed to a nearby police facility. A search of the interior of the car revealed, among other things, a stolen checkbook and checkbook register belonging to Steven White, as well as a torn up check written on White's account and made payable to Pierce in the amount of \$150.00. Pierce's fingerprints were located on the exterior driver's side door. The State charged Pierce with one count of possession of a stolen vehicle and one count of second degree possession of stolen property.

Prior to trial, Pierce moved to suppress certain physical and oral evidence. The State argued, among other things, that Pierce lacked standing to challenge the

search of the stolen vehicle. In an attempt to distinguish Pierce's case from other automatic standing cases, the State argued that it was significant that Pierce did not possess the key to the vehicle at the time of the search. Rejecting that argument, the court ruled that Pierce had standing to challenge whether the search was constitutionally permissible.

At that point, Pierce's trial counsel interrupted the court, stating, "I need to get [something] off my chest." Defense counsel went on to state that Pierce brought to court "what [Pierce] said was the key to the car" and gave it to him. The court asked the prosecutor and defense counsel, as officers of the court, to decide on the appropriate course of action. When the State indicated that defense counsel might end up being a witness in the case, the court encouraged the parties to work out a stipulation to avoid any unnecessary delays. The prosecutor and defense counsel eventually signed the following stipulation:

The parties agree and stipulate that the defendant Karl Pierce, gave a representative of the defense State's Exhibit No. 4, a car key, on the 29th day of January, 2008. On February 19th, 2008, a representative of . . . the defense turned Exhibit No. 4 over to the State.

Subsequently, State's Exhibit No. 4 was given to Officer Timothy Barnes from the Seattle Police Department. Exhibit 4 was in the same condition on February 19th as it was on the 29th day of January, 2008, when the defense representative received it from the defendant. Submitted this 26th day of February, 2008.

At trial, the prosecutor read the stipulation to the jury. The owner of the stolen Mitsubishi Montero testified that she did not know Pierce, and did not give him or anyone else permission to drive or possess her vehicle. White testified that he did not know Pierce, never wrote him a check for \$150, and did not authorize

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anyone to write checks on his checking account. Officers Barnes and Mitchell also testified to certain things they heard and saw. During cross-examination, Officer Barnes admitted that there was no apparent damage to the vehicle's ignition system, door locks, or windows. The jury found Pierce guilty as charged. This appeal followed.

ANALYSIS

Pierce contends the jury source list statute, RCW 2.36.055, and King County Local General Rule 18(e) (KCLGR) violated his state constitutional right to a “jury of the county” by allowing his jury to be drawn from only a portion of King County. He also argues that KCLGR 18(e) violated his constitutional and statutory right to a jury representing a fair cross section of the community, because it does not provide for the impartial and random selection of the jurors filling the venire. But similar arguments were recently considered by the Washington State Supreme Court in State v. Lanciloti, 165 Wn.2d 661, 201 P.3d 323 (2009).

After Pierce filed his opening brief, the Court in Lanciloti held that the jury source list statute does not violate the right to a “jury of the county.” Id. at 663. The Court also held that Lanciloti’s argument regarding whether the jury pool was selected from a fair cross section of the community was “unripe” because of “the scant factual record of the actual makeup of the jury source lists.” Id. at 672.

The State asserts that Lanciloti controls Pierce’s arguments here. If

anything, the record regarding the makeup of Pierce's jury venire is even less developed than the record the court found insufficient in Lanciloti. Pierce does not dispute, in his reply brief, the State's assertion that Lanciloti is controlling. Accordingly, Pierce's claim fails.

Pierce also contends that he was denied his right to effective assistance of counsel as guaranteed under the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22. He argues that his trial counsel was hampered by an actual conflict of interest. We disagree.

The Sixth Amendment right to counsel includes the right to assistance of counsel free from conflicts of interest. State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000); State v. Tjeerdsma, 104 Wn. App. 878, 882, 17 P.3d 678 (2001). Reversal is necessary, however, only where the defendant shows an actual conflict of interest adversely affecting the counsel's performance. In re Pers. Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). The two-part test for determining whether an actual conflict of interest deprived a defendant of effective assistance of counsel is: (1) was there an actual conflict of interest; and, (2) if so, did the conflict adversely affect the performance of defendant's attorney. State v. White, 80 Wn. App. 406, 411, 907 P.2d 310 (1995); State v. Robinson, 79 Wn. App. 386, 394, 902 P.2d 652 (1995).

Pierce argues that his trial counsel's conduct during court proceedings created an actual conflict of interest, necessitating the appointment of substitute counsel. By entering into the stipulation, Pierce argues, "defense counsel

impermissibly assisted the state in prosecuting his own client.” Thus, Pierce argues, his convictions must be reversed and the case remanded for further proceedings. This claim fails.

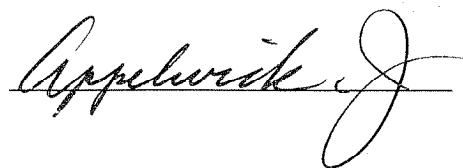
An actual conflict of interest exists where the defendant can point to specific instances in the record suggesting that the attorney was caught in a “struggle to serve two masters.” Id. at 395 (quoting Glasser v. United States, 315 U.S. 60, 75, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). To demonstrate that the attorney’s performance was “adversely affected” by the actual conflict, the defendant must show the conflict hampered the defense. Richardson, 100 Wn.2d at 677. The record, here, shows that defense counsel conducted vigorous cross-examination, raised various timely objections, and presented a defense that was entirely consistent with Pierce’s theory of the case. There is no showing that Pierce’s trial counsel had an improper motive for revealing the existence of the key, that an “actual” conflict of interest existed, or that counsel’s actions impaired Pierce’s defense in any way. As the State points out, Pierce’s possession of the key to the Mitsubishi Montero did not unduly compromise the defense theory of the case. Pierce at trial did not contest that he had possessed the vehicle. Rather, the only disputed issue was whether Pierce knew the vehicle was stolen. Contrary to Pierce’s argument, defense counsel actions did not create an “irreconcilable” conflict between counsel and Pierce.

Pierce also disputes whether the trial court adequately explored the nature and extent of any conflict existing between Pierce and his trial counsel.

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Pierce argues “the court’s inquiry was insufficient to adequately protect the Sixth Amendment rights of Mr. Pierce, leaving him with representation by counsel with whom he had a profound and actual conflict.” We disagree. While the trial court stated that it did not “want to create an unnecessary delay that would be involved with appointing a new attorney,” the court took the steps necessary to ensure that Pierce’s rights were adequately protected. The court appointed independent counsel to advise Pierce of any potential conflicts associated with defense counsel’s initial disclosure and the proposed stipulation. The record shows that Pierce was informed of the purpose for the stipulation and the reason why independent counsel was appointed. After the discussion, Pierce clearly expressed a desire to have his trial counsel sign the stipulation and proceed to trial. In response to a court inquiry as to whether there had been sufficient time to thoroughly discuss the matter with Pierce, independent counsel indicated that they had “covered everything.” Pierce also indicated that independent counsel had accurately represented the nature of their discussion. The court also had independent counsel state on the record that he was in agreement with the stipulation. Under the particular circumstances of this case, the inquiry conducted by trial court was constitutionally sufficient. There is no constitutional error.

We affirm.

A handwritten signature in cursive script, reading "Appelwick J.", written over a horizontal line.

WE CONCUR:

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Leach, J.

Edington, J.